No. 9892

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NEW YORK LIFE INSURANCE COMPANY, a corporation,

Appellant,

vs.

LOIS ROGERS,

Appellee.

APPELLANT'S REPLY BRIEF

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(References are to pages in the Transcript of Record)

In the appeal of any law suit it is inevitable that the parties will not be in complete accord in their interpretations of the record. To infer that an interpretation contrary to one's own finds its basis solely in improper motives of the opposing party merely beclouds the legal issues involved. Appellee, in her brief, abuses each witness with whom she fails to agree and directs her rather histrionic appeal to the emotions rather than to reason. After censuring appellant's counsel for writing its brief in such a manner as to necessitate a lengthy reply, appellee indulges in a diatribe of not less than

fifteen pages regarding the conduct of appellant's agents after the death of Rogers. No attempt is made to show what bearing this could possibly have on the fundamental question of whether there was a contract of insurance in force at the time of Rogers' death. Appellee chooses to disregard the obvious fact that when an agent of a company suddenly dies, leaving the company's business in an incomplete state, it is most important that other members of the company step in and finish up that business. Appellee prefers to talk of "guile", "force and stealth" and "unclean hands". Though appellant at no time has asserted that it acquired any rights by regaining possession of the policy in question along with its other papers after Rogers' death, appellee boils with indignation over this irrelevant point. Likewise, appellant has never contended that the existence of an insurance contract at the time of Rogers' death could be affected by whether or not Rogers' heirs or personal representative subsequently paid appellant a premium on the policy. These have never been issues in the case. We feel, therefore, that it is necessary to redirect the Court's attention to the three questions actually involved, namely:

1. Did appellant issue a policy as applied for by Rogers or did it reject his offer by making a counter offer?

2. Does the evidence show that there was ever a legal delivery to Rogers of the policy in question?

3. Does the evidence show that Lindberg had either actual or apparent authority to waive the Company's requirement that the first premium be paid in cash?

I

Appellant Did Not Issue a Policy of the Type Applied for by Rogers.

In her statement of facts on page 7 of her brief appellee states, "In his application, Rogers, the insured, also agreed that any addition or amendments affixed to the policy were ratified and accepted by him." On referring to Pltf's. Ex. No. 3, Tr. 95, which is cited in support of this statement, we find that Rogers applied for a policy which would pay his beneficiary double the face amount thereof in the event Rogers' death resulted from operating or riding in an unlicensed aircraft. In the questionnaire which he signed pertaining to aeronautical activities Rogers in response to the question, "To what extent do you contemplate making use of any aircraft and in what capacity?" volunteered the statement, "In case of accident I *wave* all insurance." Though Rogers indicated that he had discontinued flying, appellant, nevertheless, issued a policy on the ordinary life plan but attached thereto a Permanent Aviation Clause rider which had the effect of lessening its burden if Rogers' death occured while operating or riding in an unlicensed aircraft. Under this clause the beneficiary would receive only the reserve of the policy at the date of death instead of the face amount thereof or the double indemnity benefits. It is appellee's theory that since Rogers volunteered the ambiguous statement, "In case of accident I *wave* all insurance", appellant was not justified in issuing a policy with an aviation rider attached—that Rogers' attempted waiver rendered such a rider superfluous. No one will dispute the fact that appellant was under no obligation whatever to accept Rogers' offer. Sound business practice would not justify appellant in leaving unsettled the question of its lia-

bility in the event of Rogers' death in an aircraft. If appellant had issued a policy in the standard form with double indemnity benefits, would Rogers' statement have had the effect of releasing appellant from all liability in the event aeronautics was the cause of his death or would his beneficiary contend that because the policy contained no exceptions, appellant was liable for the face amount thereof, or even the double indemnity benefits? Appellant was justified in requiring, as a condition precedent to the completion of the contract, that Rogers execute a separate agreement for appellant's files, indicating his acceptance of the policy as modified by the rider. Appellee at page 73 of her brief states, "The evidence also showed that if there was an 'original sheet' of the Permanent Aviation Clause a duplicate of which was signed for him by the Company and attached to his policy—such original was never transmitted from the Home Office to the Local Office and that the Local Office did not have such original paper, and never presented or mentioned anything concerning it." She verifies this by citing her own statement of the facts. The instructions which accompanied the policy from the Home Office to the Arizona Office indicate that such an original was forwarded with the policy, for it states (Def's. Ex. No. C - Tr. 117), "Vital B. O. Before delivery of above policy the enclosed amend. must be signed, witnessed and returned to this office." Appellee on page 8 of her brief attempted to brush aside these instructions, stating that they are on a "stock or routine printed form" and that "This stock communication was designed to govern situations between salesmen and third parties, and was inapplicable in the instant situation." This latter conclusion is a pure figment of the imagination, having no support in the re-

cord. In fact, the Exhibit on its face shows that it pertained to Rogers' policy. Even more startling is appellee's statement, "The subject of this circular related to the waiver with respect to the aviation accidents. This was the waiver which Rogers had included and signed in his application." She concludes that Rogers' enigmatic waiver satisfactorily settled all questions that might arise and that it was, therefore, foolish for appellant to make a counter-offer which attempted to define its obligations more clearly. Mr. Caskey, the Cashier of appellant's Arizona Branch Office, explained the manner in which the policy and rider were handled (109):

"Q Would you explain to the jury, Mr. Caskey, how that is handled; what is done with the original?

"A Well, when an application goes to the home office, when you are applying for insurance on a certain plan, if they don't issue on that plan or modify your application or put a rider on it as in this particular case, they attach a copy of it to the policy and then the original which you accept is left unattached and it comes out with the policy is presented to him, well, then he has to accept the policy with the modifications. In other words, he accepts the policy with the modifications by signing the amendment or rider, whatever you want to call it, accepting it. In this particular case they modified his application by putting what they call a permanent aviation clause in there, which is a restriction on the hazard, and then if he

wants that policy that way, he has to sign that rider, that acceptance of that modification, otherwise there would not be anything (119) for him to sign. The acceptance of the policy the way it is and the payment of the premiums is satisfactory, you know, the conclusion of the deal.

"Q What is done with the original form of the rider after the applicant has signed it?

"A It is sent to the home office and filed and a copy of it is left in the policy."

Appellee argues that appellant's act in typing Rogers' signature on the copy of the agreement which was inserted in the policy amounted "to an implied consent by Rogers to the condition" (Appellee's Brief 14). This line of thought we are unable to follow.

In response to a question as to how a policy is handled when the branch office receives it from New York, Caskey testified (120) "* * * it is sent to the agent and with it is a, what you may call an invoice form giving him certain instructions on there as to what to do or what not to do, requirements and different things of that sort." In view of this testimony regarding the customary routine it is reasonable to infer that the policy was sent to Rogers with the original unsigned aviation agreement and with instructions similar to those which accompanied the policy from New York.

However, nothing is to be served by quibbling over what inferences should be drawn from the evidence on this point, for it is clear that even had Rogers paid the

initial premium in cash but had died while the policy was en route to the Arizona office, there would have been no liability. Appellant, by issuing a policy containing these modifications, was in effect making a counter-offer. Regardless of the fact that appellee considers such modifications to be superfluous, it was, nevertheless, a policy differing from that applied for, and until that policy was legally delivered to Rogers there could be no contract. The authorities cited in our opening brief clearly sustain this proposition. If the law were otherwise, insurance companies would be helpless to protect themselves against the confusion which results when an applicant volunteers a statement such as, "In case of accident I *wave* all insurance", and at the same time applies for a policy containing double indemnity benefits.

The case of *Bloom v. Pacific Mutual Life Insurance Co.* (Calif. 1927, 259 Pac. 496) cited by appellee on page 16 of her brief merely amounts to a holding that where a company delivers a policy unconditionally to an applicant with the intent that the insurance become immediately effective, the company thereby waives its objection to the applicant's previous failure to sign the application. It does not involve a situation where there is a counter-offer made by the company and there is no delivery of the policy constituting such counter-offer.

II

The Evidence Shows That There Was Never a Legal Delivery to Rogers of the Policy in Question.

It was a real challenge to the imagination of appellee's counsel to avoid the forceful effect of the evidence on this point, for said evidence is clear and uncontra-

dicted. Mr. Caskey testified that when the Branch Office receives from the Head Office a policy on an agent's own life it is the practice to hold the policy until the agent can come in and pay the premium and sign any amendments that are necessary (123). He further testified that this policy was forwarded to Rogers through error in office routine resulting from the fact that the typist who billed the policies out to the agents in groups of 75 or 100 did not recognize the name of Rogers (124). The policy was sent to Rogers in disregard of the above practice. As soon as Caskey discovered the mistake he wrote Rogers, advising him of the mistake, explaining the Company's practice where the agent was the applicant, and asking him to return the policy (129-D's Ex. E). Appellee implies that Caskey, scenting Rogers' death from afar, became frantic to get the policy back. "It is to be remembered that Caskey's letter of the 23rd could not reach Rogers until the date of his death, and that he (Rogers) would have no opportunity to suggest the existence of his credit arrangement with Mr. Lindberg, or to comply with any request to pay the initial premium (Appellee's brief 25)." Appellee attributes sinister motives indeed to Mr. Caskey. The inference to be drawn is that Mr. Caskey knew very well that the finger of death was pointed at Rogers and, therefore, wrote this letter in order to have some good evidence to use in the event of a law suit. This, we submit, is ludicrous. To strengthen her accusation appellee states, "This letter in the ordinary course of mail delivery would have reached Mr. Rogers about January 26, 1940, which was the date of his accidental death (Appellee's Brief 10)." There is, of course, no reason to assume that the U. S. mails would require three days to send a letter 250 miles. The evidence that the letter was found in Rogers' pos-

session after his death makes this point hopelessly weak (215).

But, says appellee, "He (Rogers) did not, therefore, remit the amount of premiums hoped for by Mr. Caskey, and thereupon, Mr. Caskey decided that he might improve the securities position of his company and hasten collections by the sending of his letter of January 23rd requesting Rogers to return his policy (Appellee's Brief 25)." These speculations of counsel find not the slightest support in the record. If such had been the case, why did not Mr. Caskey say, "The time for credit is up—please return the policy." Why did he go to the pains of writing: "The policy issued on your life was forwarded to you in error as until settlement of the first premium had been made in case we are not permitted to forward a policy to an agent on his life." Appellee, however, desperately continues to ignore the record and to draw facts from thin air: "When Caskey says that he first learned Rogers was holding his own (Rogers) policy when he received Rogers' report some time about January 15th he is mistaken—His own records and his own communications challenge his statement and establish the fact that he knew perfectly well that Rogers had this policy all the time" (Appellee's Brief 25). Appellee then cites Defendant's Exhibit D, which has not been designated as part of the record. This Exhibit consists of a statement which the Branch Office sends its agents on the 15th of every month for the purpose of obtaining a report on policies which had been billed out to the agent during the preceding thirty days (125). Because the report which was sent to Rogers listed his own policy along with many other policies which had been mailed to him, appellee concludes that Caskey knew all the time

that Rogers had the policy and was therefore merely indulging in a whimsy when he wrote the above letter advising Rogers of the mistake. Had appellee's counsel been a little less eager to smear Mr. Caskey's character he would have realized that the head of an office force consisting of twelve or fourteen clerks does not personally sit down each month and type out bulletins such as this to forty or more agents requesting information on hundreds of different policies which had been sent to them. Routine such as that obviously would be the duty of the clerks. Mr. Caskey testified that when this report was returned he audited Roger's account and learned for the first time that Rogers' own policy had been sent to him (125).

Appellee expresses disgust that appellant falls back on such truisms as "Legal delivery of policy to Rogers was essential to a consummation of the insurance contract (Appellee's brief 19)." On page 26 of our opening brief, we point out that under the authorities there cited the test for legal delivery is "whether the company or its agents intentionally part with control or dominion of the policy and place it in the control or dominion of the insured or some person acting for him with the purpose of thereby making a valid and binding contract of insurance." In the instant case the existence of the evidence relative to the mistake in mailing the policy is important in that it shows that there was a complete lack of the requisite intent to make a legal delivery. If a person having in his possession a $10.00 bill and a $100.00 bill, by mistake gives the $100.00 bill to another person thinking that it was a $10.00 bill, would anyone contend that he should not be allowed to correct the mistake? Because the mistake was not a "mutual" one, the unfortunate

person would not, under appellee's theory of the case, be permitted to recover his $100.00 bill. Appellee cites a well recognized line of decisions holding that if one has entered into a contract with another he cannot later rescind that contract on the grounds of mistake unless there was "mutuality of mistake", etc. It is apparent that these decisions are in no way relevant to the proposition that there cannot be a legal delivery of a document where the requisite intent to part with possession of it is lacking. As the uncontradicted evidence in the record shows that the policy left appellant's possession as a result of error in office routine, there is no basis for contending that the requisite intent to make a legal delivery was shown. Needless to say, had this error not occurred and had the policy remained in appellant's files, there would never have been a law suit. To base a recovery on such a fortuitous occurrence as this, to say the least, is most inequitable.

III

Rogers Was Advised of the Fact that Lindberg Was Without Authority to Extend Credit for the Payment of the First Premium.

Although appellee accedes to the legal propositions we cite under this issue, she, nevertheless, asserts that this defense is purely "technical" and "restrictive". In an attempt to avoid the effect of the book entitled "Instructions to Agents" (Def. Ex. F) appellee states on page 2 of her brief: "There is no proof that such pamphlet or any other prepared office regulation respecting the issues of this case, were ever given by any authorized company official, to Rogers, the insured, or that the provisions of the 'Pamphlet' are observed in actual prac-

tice." We respectfully direct the attention of the Court to the following testimony of Mr. Caskey (210):

"Q Was Mr. Rogers given a copy of this set of instructions?

"A Yes, he was at the time he signed his contract papers."

It will be remembered that this Book of Instructions provided (Def's. Ex. F-Tr. 137): "The Company will not accept a note in payment of the whole or any part of the first premium on a policy. The Company will accept cash only in payment of a first premium. If an agent takes a note, he does so at his own risk and must be personally responsible for the same." Appellee argues that since the evidence shows that on occasions an agent would accept from applicants notes payable to the agent personally, the record supports her conclusions that the above instructions are not observed in actual office practice. This, we submit, is a non sequitur. Also, states appellee, "The book of instructions referred to, applied to soliciting agents. It is assumed such books of instructions were given to soliciting or local agents. There is nothing about the book or anything in the record to show that the instructions in such document related to or pertained to the duties and authority of Mr. Lindberg." (Appellee's Brief 35). This is a perplexing statement in view of the clear, unconditional statement in the Instructions to the effect that "The Company will accept cash only in payment of a first premium." It is difficult to find any basis for appellant's assumption that Mr. Lindberg, whom appellee designates as an "alter ego, the plenipotentiary, the factotum" of the Company, is an exception

to this rule. Though the record does show that, as provided in the above instructions, the Company's agents may take notes, it does not disclose any instances where the appellant company ever accepted anything other than cash in payment of the first premium when an applicant applied directly to it for insurance.

There is no ambiguity in the record on the appellant's method of doing business—a method which appellee designates as being "subtle and elusive". As we have seen, the book entitled "Instructions to Agents" provides that the Company will accept cash only in payment of a first premium but that an agent may take a note. If he does so, however, it is at his own risk and he is personally responsible for the same. Mr. Lindberg testified that "The agents are permitted to take notes payable to themselves when they deliver a policy to the applicant, other than an agent of the Company (Tr. 205)" and that "If the note is not paid by the applicant, the agent has to pay the note (205)." From this testimony that agents are permitted to accept notes payable to themselves, appellee jumps to the conclusion that where the agent is an applicant the Company will cast aside its established rules and will extend credit to him. At the risk of again being accused of "intellectual dishonesty" we state that this conclusion does not logically follow. Because appellant's policies constitute receipts for the payment of the first premium (Tr. 156), if such a policy is legally delivered, there arises an irrebuttable presumption that such premium was paid. (32 Corpus Juris 1138) Thus an agent who delivers a policy without receiving cash may protect himself against the legal effect of these recitals acknowledging payment of the premium, only by taking a note or some other

evidence of indebtedness. If he delivered the policy without doing this, he would be unable to collect the first premium, for the recitals in the policy would estop him from contending that such premium had not been paid. It follows that a company would not deliver a policy directly to an applicant without taking steps to avoid the conclusive effect of the recitals in the policy that the premium had been paid. Since it was the Company's established rule not to accept notes but to accept cash only, it stands to reason that it would not deliver a policy to an agent where he was the applicant without first obtaining the premium in cash. Obviously, a company must trust its agents to remit the cash premium if they collect it or to remit cash in lieu of a premium if the agent assumes the risk of taking a note. In either case, the Company must rely on the honesty of its agents to send in premiums on the policy which they delivered. Under appellee's theory of the case the Company would be doing a credit business even though the agents collected nothing but cash from applicants, for "the Company would be relying on its agents to remit the cash—and therefore, in effect, is extending credit to them." There is not one instance where the Company extended credit to an applicant.

Appellant's practice of permitting agents to take notes payable to themselves to cover first premiums is immaterial here, for the reason that Rogers applied directly to the Company for his policy. The record is clear that the Company has consistently followed the practice of accepting nothing but cash in payment of the first premium.

Not only did the Book of Instructions advise Rogers

of this fact but the application which Rogers signed stated that the insurance applied for would not go into force until the first premium was paid in full (94-95). It further provided that only the President, a Vice-President, a Secretary or the Treasurer of the Company could waive any of the Company's rights or requirements. "The application, fairly construed," the appellee argues on page 36 of her brief, "related to the limitations on the authority of *soliciting* agents. Therefore, it cannot be argued that Rogers, as the assured, had any notice or knowledge of limits to Mr. Lindberg's authority." Since Lindberg was not one of those officers designated as being the *only* ones who were authorized to waive the Company's requirements, it is difficult to find any logic in appellee's argument that the application did not give Rogers notice that Lindberg lacked authority. The authorities cited on page 31 of our opening brief support the proposition that an applicant is put on notice of the limitations on the agent's authority which were set forth in the application. Appellee attempts to brush aside these decisions, saying that they involve mere soliciting agents. If any legal effect is going to be given to a clause providing that only certain officers can waive a condition of the application, the rank of the agent attempting to make such waiver can have no bearing on the question if, in fact, he is forbidden to waive. In the absence of facts giving rise to an estoppel courts have consistently upheld the right of a principal to limit the authority of its agents by these non-waiver provisions in the application.

In support of the proposition that a general agent may waive a stipulation in a policy that no liability shall attach until the first premium is paid, appellee at page

36 of her brief cites *Snyder v. Nederland Life Ins. Co.*, 202 Pa. 161, 51 Atl. 744. An examination of the case discloses that there were no limitations whatever placed on the authority of the general agent. The case was decided in accordance with the general rules of law regarding apparent authority. It is not applicable to the instant case where both the application and the Book of Instructions advised the applicant of the general agent's lack of authority. The case of *Union Life Ins. Co. v. Haman*, 74 N. W. 1090, which appellee cites on page 36 of her brief, is likewise inapplicable for the same reasons. In fact, appellee cites numerous cases relative to the apparent authority which a general agent ordinarily has. The fact that Rogers as one of appellant's agents was conversant with appellant's regulations and had notice of the limitations on Lindberg's authority is consistently ignored. We submit that because of Rogers' knowledge of these limitations, the doctrine of estoppel and apparent authority have no application in the instant case. Nothing would be gained, therefore, by discussing the numerous cases appellee cites in support of these general propositions of law.

Conclusion

There is a notable lack of conflict between the legal authorities cited by appellee and those cited by appellant. On the interpretation of the record, however, there is considerable dispute. We submit that the record is clear and convincing as to the existence of the following facts on which our conclusions of law are predicated:

(a) The policy was forwarded to Rogers as a result of error in office routine.

(b) Rogers, as an applicant and as a man engaged in soliciting insurance for appellant, was put on notice by the terms of the application, and also by the book of instructions, that Lindberg was without authority to waive the Company's requirement that the first premium be paid in cash.

It is reasonable to conclude that had the above error not occurred and had the policy remained in appellant's possession, this litigation never would have been instituted.

Respectfully submitted,

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